(9)

No. 98-223

In The

Supreme Court of the United States

October Term, 1998

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

RICHARD J. TROBERMAN*
1325 Fourth Ave., Suite 1200
Seattle, WA 98101-2509
(206) 343-1111

LISA B. KEMLER
108 N. Alfred Street
Alexandria, VA 22314
(703) 684-8000

**Counsel of Record for Amicus Curiae National Association of Criminal Defense Lawyers*

[Additional Counsel Listed On Inside Cover]

29pp

EDWARDS, SIMMONS & OLIVER
WESLEY MACNEIL OLIVER
1501 Sixteenth Avenue South
Nashville, TN 37212-2095
(615) 292-9280

HOLLAND & KNIGHT
TOM BISHOP
50 N. Laura Street
Jacksonville, FL 32202
(904) 798-7305

QUESTION PRESENTED

Does the United States Constitution require law enforcement officers to obtain a judicially authorized warrant before they may seize a motor vehicle which they have probable cause to believe is subject to forfeiture under state law?

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This *amicus curiae* brief is submitted by on behalf of Respondent, Tyvessel Tyvorus White. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party other than *amicus curiae* and its counsel authored this brief in whole or in part; no person or entity, other than *amicus curiae*, its members, or its counsel, have made monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. One of NACDL's objectives is to ensure that statutes are construed and applied in accordance with the Constitution.

NACDL has long been troubled by the expanding use of civil forfeiture proceedings in our criminal justice system. We have deep concerns about the fairness of some of these laws and the aggressive way they are used by state and federal prosecutors to inflict punishment and deprive individuals (including innocent persons) of significant property interests, often without any of the constitutional and procedural protections generally accorded to either criminal or civil defendants.

The Florida statute at issue in this case provides that property used in violation of the Florida Contraband Act may be seized and forfeited. The statute does not require that such seizures be made pursuant to a warrant. The parallel federal civil forfeiture statute, 21 U.S.C. §881, expressly authorizes the seizure of property *without prior judicial process* "when the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter." 21 U.S.C. §881(b)(4). We agree

with the Supreme Court of Florida below, and those decisions of several federal courts of appeals, which hold that there is no "forfeiture seizure" exception to the Fourth Amendment warrant requirement. NACDL advocates this position to preserve the right of the people to be free from unreasonable searches and seizures. Thus, NACDL has a vital interest in the outcome of this case, and urges the Court to affirm the decision below.

SUMMARY OF ARGUMENT

Subject to only a few specifically established exceptions, seizures conducted outside the judicial process are per se unreasonable. There is no "forfeiture exception" to the warrant requirement. There were no exigencies requiring prompt action, and neither the automobile exception nor the plain view exception can justify the warrantless seizure in this case. The seizure of Respondent's automobile clearly infringed on his privacy interest as well as his possessory interest in the vehicle.

Moreover, the Fourth Amendment does not provide the sole measure of constitutional protection to property owners in forfeiture cases. Where the government seizes property not to preserve evidence of wrongdoing, but to assert ownership and control over the property, the government must also comply with the Due Process Clauses of the Fifth and Fourteenth Amendments.

Analyzing the reasonableness of the seizure in light of the post-seizure procedures available and the Government's direct pecuniary interest in the outcome of forfeiture proceedings leads to but one conclusion: the seizure in this case was constitutionally impermissible.

ARGUMENT

I. THE PROTECTION OF PRIVATE PROPERTY RIGHTS IS CENTRAL TO OUR HERITAGE.

A brief review of the importance of property rights in our society is indispensable to a resolution of the issues before the Court.

Throughout the history of western democratic societies, the importance of private property as a "concomitant to liberty" has been widely recognized. See, John Locke, THE SECOND TREATISE ON CIVIL GOVERNMENT, ¶¶ 123-42.[2] Indeed, this Court has recognized that "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972). Likewise, as recently observed by this Court, "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61, 114 S.Ct. 492, 505, 126 L.Ed.2d 490 (1993).

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[2] The Founders understood that private property was a fundamental aspect of personal liberty and, moreover, a major goal of the Revolution itself. In the Declaration of Independence, Jefferson, borrowing from John Locke, asserted that the goals of the nation were "life, liberty, and the pursuit of happiness." Locke's language, of course, had been "life, liberty, and property." Jefferson rightly understood that property was a part of both liberty and the fundamental happiness of the people. The demand for a Bill of Rights naturally included the demand for the protection of property, which the Founders regarded as "the guardian of every other right." James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: THE CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992).

The nature and quality of a citizen's freedom and security relates directly to his or her ability to own property and to be secure from governmental intrusion therein. "[I]n a free government almost all other rights would become worthless if the government possessed power over the private fortune of every citizen." *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 236, 17 S.Ct. 581, 41 L.Ed. 979 (1897); Leonard W. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION, 276-77 (1988).

II. THE DECISION OF THE FLORIDA SUPREME COURT IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THE COURT.

Petitioner argues that the Florida Supreme Court's decision conflicts with *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), and *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967).[3] This argument ignores critical factual and legal distinctions between these cases and the case at bar.

The Court's decision in *Carroll* reviewed the action of law enforcement officers in stopping and searching a vehicle suspected to be carrying contraband. *Carroll* set the bar for probable cause to search in such circumstances. The Court compared automobiles with vessels, and held that they could be searched without warrants. But *Carroll* did not consider the issue presented here: Whether in the absence

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[3] The question presented in Florida's petition for writ of *certiorari* was "[W]hether the decision of the Florida Supreme Court . . . conflicts with decisions of the Court in *Carroll v. United States, Calero-Toledo v. Pearson Yacht Leasing*, and *Cooper v. California* . . ."

of exigent circumstances the warrantless seizure of an automobile for civil forfeiture is constitutionally permissible. *Carroll* addressed only the constitutional requirements for stopping and searching a vehicle believed to be carrying contraband. Although *Carroll* is a bedrock case for the stop and search of an automobile and the requisite probable cause for those actions, it provides no guidance for the analysis of the validity of the seizure of a vehicle for civil forfeiture.

Calero-Toledo is similarly distinguishable. That decision addressed the due process considerations of seizure without prior notice or hearing under a Puerto Rican forfeiture statute. The Court held that due process was not offended under such circumstances because of the movable nature of the yacht.[4] *Id.* at 2089, 2090. *Calero-Toledo* specifically left open "the question whether the Fourth Amendment warrant or probable-cause requirements are applicable to seizures under the Puerto Rican statutes." *Id.* at 2090 at n. 14.

Nor does the Florida Supreme Court's decision conflict with this Court's decision in *Cooper,* where the Court considered the admissibility of contraband seized from a vehicle which police had impounded upon the defendant's arrest. *Id.* at 789. The Court in that case reviewed only the validity of an inventory search conducted after the impoundment of the vehicle. *Cooper* did not consider the validity of the seizure itself and, in fact, assumed that the

[4] Central to the Court's analysis was the fact that a yacht was the "sort [of property] that could be removed to another jurisdiction, destroyed or concealed, if advance warning of the confiscation were given." *Calero-Toledo, supra,* 416 U.S. at 679. Of course, those concerns simply do not arise from the issuance of an *ex parte* judicial warrant.

seizure was lawful for purposes of the opinion. *Id.* at 791. Thus, *Cooper* did not address the heart of the appeal at bar, the lawfulness of a seizure for civil forfeiture.

Moreover, *Cooper* is factually distinguishable from the instant case. *Cooper* emphasized that the police officers who seized Cooper's car were required to do so under a California statute, and that the seizure was made in order to preserve the automobile for evidence. *Id.* at 791. In the instant case, however, the officers were not required to seize the automobile. They did so either to facilitate the forfeiture or, perhaps, to allow them to search the vehicle without concern for the probable cause requirements of the Fourth Amendment. Such a circumstance was not addressed in *Cooper.*

III. NO RECOGNIZED EXCEPTION TO THE WARRANT REQUIREMENT EXISTED WHICH WOULD JUSTIFY THE WARRANTLESS SEIZURE IN THIS CASE.

Subject to only a few specifically established exceptions, searches and seizures conducted outside the judicial process, without the prior approval of a judge or magistrate, are per se unreasonable. *Mincey v. Arizona,* 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d. 575, (1967). "The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation make the course imperative.' [T]he burden is on those seeking the exemption to show the need for it" (Citations omitted). *Coolidge v. New Hampshire,* 403 U.S. 443, 455, 91 S.Ct 2022, 29 L.Ed.2d 564 (1971). There is no "forfeiture exception" to the warrant requirement. *United States v. Lasanta,* 978 F.2d 1300, 1305 (2nd Cir. 1992).

It is uncontested that Respondent's vehicle was seized without a warrant. Petitioner also concedes that the seizure was not incident to Respondent's arrest. Moreover, the Court below found that there were no exigent circumstances justifying the need for prompt action. Indeed, the alleged act giving rise to the forfeiture had occurred more than two months prior to the seizure, and at the time the vehicle was seized, it was lawfully parked and locked, and Respondent had already been arrested and the keys found in his pocket. Nevertheless, Petitioner relies on an expansive and strained reading of prior decisions of this Court, which are clearly inapposite, to defend the unlawful seizure.

A. The "Automobile Exception" Does Not Apply.

The thrust of Petitioner's argument is that the so-called automobile exception justifies the warrantless seizure in this case. However, the automobile exception is not a blanket exception for all vehicles at all times. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge, supra,* 403 U.S. at 461-62. Rather, the exception finds its underpinnings in the inherent mobility of automobiles. The Court summarized the exception in *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970):

> In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. Carroll, supra, holds a search warrant unnecessary where there is probable cause to search an *automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.* Hence, an immediate search is constitutionally permissible.

Id., 399 U.S. at 51 (emphasis supplied).

In the case at bar, the Supreme Court of Florida found that there were no exigent circumstances. "[T]he absence of probable cause to believe contraband was in the vehicle combined with an obvious lack of any other exigent circumstances renders the automobile exception inapplicable here . . . There was simply no concern presented here that an opportunity to seize the vehicle would be missed because of the mobility of the vehicle." *Florida v. White,* 710 So.2d 949, 953. That determination is amply supported by the record, and should not be disturbed.

B. The "Plain View" Exception Does not Apply.

The United States and the States Attorney Generals attempt to support the warrantless seizure based on the plain view exception. However, that doctrine applies only to contraband and evidence of a crime, and is clearly inapplicable to the facts at bar.

What all of this Court's plain view cases have in common, and what is missing in this case, is that the

property seized was either "contraband" or "incriminating evidence." *Horton v. California,* 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) is instructive on this point.[5] Focusing on the nature of the property to be seized, the Court observed that "not only must the item be in plain view; its incriminating character must also be 'immediately apparent.'" *Id.*, 496 at 136 (citing *Coolidge, supra,* 403 U.S. at 466). See also, *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (it is "well settled that *objects such as weapons or contraband* found in a public place may be seized by the police without a warrant") (emphasis supplied).

Recognizing the obvious limitations of the plain view doctrine, Petitioner attempts to characterize Respondent's vehicle as contraband. But that cramped view has been previously rejected by this Court. As the Court observed in *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 699, 85 S.Ct. 1246, 1250, 14 L.Ed.2d 170 (1965): "[T]here is nothing even remotely criminal in possessing an automobile." More recently, in *Austin v. United States,* 509 U.S. 602, 621, 113 S.Ct. 2801, 2811, 125 L.Ed.2d 488 (1993), referring to a vehicle seized for forfeiture because it had been used to facilitate a drug transaction, the Court observed: "[T]he government's attempt to characterize th[is] propert[y] as 'instrument[]' of the drug trade must meet the same fate as Pennsylvania's effort to characterize the 1958 Plymouth sedan as contraband."

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[5] The specific question addressed by the Court in Horton was "[W]hether the warrantless seizure of *evidence of a crime* in plain view is prohibited by the Fourth Amendment if the discovery of the evidence was not inadvertent." 496 U.S. at 128 (emphasis supplied).

The United States persists in trying to squeeze within the confines of the plain view doctrine by shrewdly utilizing the description "susceptible to seizure" interchangeably with "incriminating nature of the item" or "evidence of a crime." See, *e.g.*, Brief of United States at 18 ("The automobile's *susceptibility to seizure* was 'immediately apparent' within the meaning of this Court's decisions"). But Respondent's vehicle was not seized because it was evidence of a crime (clearly it was not); it was seized because the state intended to forfeit the vehicle in a separate civil proceeding. As such, it clearly falls outside the category of objects which may be seized without a warrant under the plain view doctrine.

C. The Seizure Infringed on Respondent's Privacy Interests.

Finally, the United States attempts to justify the warrantless seizure of Respondent's vehicle by arguing that the seizure merely infringed upon Respondent's possessory interest which, it argues, is not entitled to the same protections as privacy interests. See, *e.g., Arizona v. Hicks,* 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). That argument is, at best, specious, and ignores the reality of what inevitably and invariably occurs following a seizure of a vehicle. See, *e.g., Illinois v. Lafayette,* 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983), upholding inventory searches of seized vehicles.

Although Respondent admittedly had no privacy interest in the *outside* of his vehicle, which was parked in a public place, he most assuredly had a privacy interest in the *contents* of the locked vehicle, which were not exposed to

the public.[6] Thus, a fortiori, it is clear that Respondent's privacy interests were both implicated and infringed upon by the seizure and subsequent search of his vehicle.

V. WHERE THE GOVERNMENT SEIZES PROPERTY NOT TO PRESERVE EVIDENCE OF WRONGDOING, BUT TO ASSERT OWNERSHIP AND CONTROL OVER THE PROPERTY ITSELF, THE GOVERNMENT MUST ALSO COMPLY WITH THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS.

This Court has previously rejected Petitioner's argument that the Fourth Amendment provides the sole measure of constitutional protection that must be afforded to property owners in forfeiture proceedings. *Good, supra,* 510 U.S. at 51, 114 S.Ct. at 500 (1993) ("Though the Fourth Amendment places limits on the Government's power to seize property for purposes of forfeiture, it does not provide the sole measure of constitutional protection that must be afforded property owners in forfeiture proceedings"). Thus, the Court has held that where, as here, the government seizes property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself, the government must also comply with the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id.*, at 52.

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[6] During an inventory search following the seizure, the police found two rocks of crack cocaine which were wrapped in paper and placed inside a paper bag, which was placed inside the vehicle's ashtray. The cocaine was not visible from any public vantage point. Joint Appendix, at A-27. Moreover, even if the police had not conducted an inventory search following the seizure, they obtained the keys from Respondent and drove the car to the police station. The act of entering the car and driving it away necessarily infringed on Respondent's privacy interest in the interior of the vehicle.

The Court in *Good* also rejected the argument advanced by Petitioner here that requiring a warrant for the seizure of property for forfeiture elevates the protections of an accused's property over that of his person,[7] noting that the arrest or detention of a person occurs as part of the criminal process, "where other safeguards ordinarily ensure compliance with due process." *Id.*, at 50. Citing its earlier decision in *Gerstein v. Pugh,* 450 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), the Court further observed that exclusive reliance on the Fourth Amendment is appropriate in the arrest context, because the Amendment "was tailored explicitly for the criminal justice system," and its "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person *or property* in criminal cases." *Id.*, at 125, n. 27 (emphasis supplied). Finally, the Court noted that the protections afforded during an arrest and initial detention of a person are "only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." *Ibid.*

A. The Reasonableness of the Warrantless Seizure in this Case Must be Assessed in Light of the Post-Seizure Procedures Available and the Government's Direct Pecuniary Interest in the Outcome of the Proceeding.

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[7] As Justice Powell cogently observed in his concurring opinion in *United States v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 820 (1976), "There is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers. See, N. Lassen, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 79-105 (1937)." *Id.*, 423 U.S. at 429.

1. The post-seizure procedures available.

There is a stark contrast between the procedures available to a defendant in a criminal case and those available to a claimant in a civil forfeiture proceeding. For example, a person is entitled to be brought before a magistrate within 48 hours following an arrest, at which time the government bears the burden of establishing probable cause for the arrest and continued detention. *See, e.g., Riverside County v. McLaughlin,* 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). Similarly, a defendant may immediately move the appropriate court for return of property which has been unlawfully seized. See, *e.g.,* Fed.R.Crim.P. 41(e).

On the other hand, claimants in most civil forfeiture proceedings are afforded only minimal protections.[8] There is no right to a prompt post-seizure judicial probable cause hearing in forfeiture proceedings brought pursuant to the federal drug forfeiture statute (21 U.S.C. §881).[9] Indeed,

[8] The Florida Contraband Forfeiture Act provides more protections than most state forfeiture statutes. For example, it provides that a person may request a post-seizure probable cause hearing. The request must be made within 15 days after receipt of the notice of seizure. The hearing, if requested, must then be held within 10 days after the request for hearing is made, "or as soon thereafter as is practicable." Fla. Stat. Ann. §932.703(2)(a) (Supp. 1999). Thus, even under this statute it is possible that the post-seizure hearing may not occur for 25 days, or even longer, after notice of seizure.

[9] Unless a claimant in a federal drug forfeiture presents a timely claim, which must be accompanied by a cost bond equal to 10% of the value of the seized property (not less than $250 nor more than $5,000), the case will never be filed in court. 19 U.S.C. §1608. In such cases, there would never be an opportunity for judicial review of the police

the federal forfeiture statute does not contain a statutorily mandated time limit for giving notice of the seizure to interested persons. Moreover, the federal statute does not impose a time limit on when the government must file a civil complaint for forfeiture following receipt of a claim and cost bond.[10] In its most recent decision on the subject, this Court held that a delay of 18 months in filing a civil forfeiture complaint did not violate the claimant's right to due process of law. *United States v. $8,850 in United States Currency,* 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983).

Further exacerbating the problem, once the government serves an administrative notice of seizure and intended forfeiture, courts are divested of jurisdiction to hear a motion for return of property pursuant to the criminal rules.[11]

officer's probable cause determination. Moreover, even if the owner files a claim and cost bond, the government is under no statutory obligation to promptly commence a judicial forfeiture proceeding.

[10] The federal drug forfeiture statute does contain expedited procedures for seized conveyances. 21 U.S.C. §888. However, even these procedures do not require the government to commence a judicial proceeding for up to 60 days following receipt of a claim and cost bond. Of course, the claim and cost bond can only be filed after receipt of proper notice, which can take up to an additional 60 days. Thus, even under these "expedited" procedures, it would likely be more than four months before a property owner could challenge the police officer's probable cause determination in court.

[11] See, *e.g., United States v. One 1987 Jeep Wrangler,* 972 F.2d 472 (2nd Cir. 1992); *Industrias Cardoen, Ltd. v. United States,* 983 F.2d 49 (5th Cir. 1993); *Shaw v. United States,* 891 F.2d 602 (6th Cir. 1989); *United States v. Elias,* 921 F.2d 870 (9th Cir. 1990); *Frazee v. IRS,* 947 F.2d 448 (10th Cir. 1991); *United States v. Castro,* 883 F.2d 1018 (11th Cir. 1989); *United States v. Price,* 914 F.2d 1507 (D.C. Cir. 1990).

Thus, once the administrative notice is issued, access to the courts to contest probable cause is denied until the government commences the judicial forfeiture proceeding. Consequently, there may be no opportunity for judicial review of the seizing officer's probable cause determination for many months, or even years, if ever.

This Court has previously recognized that even the availability of a post-seizure hearing may be no recompense for losses caused by erroneous seizures. The Court observed in *Good*

> Given the congested civil dockets in federal courts, a claimant may not receive an adversary hearing until many months after the seizure. And even if the ultimate judicial decision is that . . . the Government lacked probable cause, this determination, coming months after the seizure, "would not cure the temporary deprivation that an earlier hearing might have presented." [Connecticut v.] Doehr, 501 U.S. [1], at 15, 111 S.Ct. [2015], at 2115.

510 U.S. at 56. Consequently, a pre-seizure warrant based upon a judicial determination of probable cause is the only practical procedural safeguard.

B. The Government has a Direct Pecuniary Interest in the Outcome of the Proceeding.

This Court, which acknowledged the government's direct pecuniary interest in the outcome of forfeiture proceedings in *Good*, 510 U.S. at 56, has traditionally recognized the need for special scrutiny where the

government stands to benefit financially from the imposition of sanctions as a result of criminal conduct. *See, Harmelin v. Michigan,* 501 U.S. 957, 979, n. 9, 111 S.Ct. 2680, 2693, n. 9, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J., ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit").

Given the government's direct and substantial pecuniary interest in civil forfeiture proceedings, a governmental seizure of property without a prior judicial determination of probable cause should be allowed only upon a clear showing of extraordinary circumstances. As Justice Jackson wrote a half-century ago concerning the preference for a warrant: "[T]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of usual inferences which reasonable men draw from evidence. Its protection consists of requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 13, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). The protection of a pre-seizure warrant is even more important here, where the government has a direct financial interest in the outcome of the proceeding.

Consideration of these factors utilizing the three-part inquiry set forth in *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) also provides guidance.[12]

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[12] The *Mathews* inquiry was utilized by this Court in *Good* to determine whether due process required notice and an opportunity to be heard prior to the seizure of real property. The Court had previously held that no such notice was required for the seizure of a yacht, because of the inherent mobility of the property and the possibility that it could

1. The Property Owner's Interest. Under this prong, the court must evaluate the owner's interest in protecting his vehicle from seizure. In today's mobile society, this interest is clearly significant. Moreover, when property rights are at issue, so too are liberty rights. As Justice Stewart wrote:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the property in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without he other. That rights in property are basic civil rights has long been recognized.

Lynch, supra, 405 U.S. at 552.

2. The Risk of Erroneous Deprivation. This Court has emphasized that, especially where a party has a pecuniary interest in the outcome, "making realistic assessments" of the merits of a case based on *ex parte* showings is difficult because these showings can be "one-sided, self-serving, and conclusionary." *Doehr,* 111 S.Ct. at 2114. A fortiori, leaving the determination to a police officer who ultimately stands to gain from the forfeiture,

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be removed from the jurisdiction or destroyed or concealed if advance warning of the seizure were given. Those concerns, of course, are not implicated by a judicially authorized warrant, which is obtained *ex parte*.

rather than to a neutral and detached magistrate, substantially increases the likelihood of an erroneous deprivation. This is especially true given the absence of a prompt post-seizure hearing to contest the probable cause determination. See discussion, *supra,* at 16-17.

3. The Government Interest. The governmental interest to be considered is the government's interest in seizing property without a warrant, not the government's interest in forfeiting property. See, *Good,* 510 U.S. at 56. The government's interest in seizing vehicles to deter illegal drug trafficking would not be affected by requiring a judicially approved warrant for seizure. With a warrant, the government would still be able to seize property, provide a significant deterrent to drug trafficking, and enhance revenue for law enforcement, while at the same time protecting the property owner from an erroneous deprivation of property rights. Moreover, requiring a warrant would not place any additional fiscal or administrative burdens on law enforcement.

It is worth noting here that federal government, as a matter of *policy,* encourages the use of pre-seizure warrants. Brief of United States, at n. 1. Significantly, the Solicitor General does not even suggest, let alone argue, that this policy has lead to any hardships or "missed opportunities" for agents in the field to successfully seize property for forfeiture. The federal government's experience thus flies in the face of Petitioner's claim that requiring law enforcement to obtain a pre-seizure warrant where no exigent circumstances exist will lead to an "incalculable" additional burden. Petitioner's Brief at 22. Indeed, it seems odd that the Florida Attorney General, who is the state's top law enforcement officer, considers the constitution to be a burden and a "arbitrary roadblock" to effective police investigation.

Ibid. Let no one be fooled, however. Should this Court determine that warrantless seizures of vehicles for forfeiture are permissible in the absence of any recognized exception to the warrant requirement, the government's "policy" encouraging the use of warrants will become a footnote in history before the ink is dry on the Court's opinion.

The balance of the *Mathews* factors in this context is straightforward. In the absence of exigent circumstances, the Fifth and Fourteenth Amendment Due Process Clauses require a judicially approved warrant to seize a vehicle for purposes of civil forfeiture, independent of the protections guaranteed by the Fourth Amendment.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted.

RICHARD J. TROBERMAN*
1325 Fourth Ave., Suite 1200
Seattle, WA 98101-2509
(206) 343-1111

LISA B. KEMLER
108 N. Alfred Street
Alexandria, VA 22314
(703) 684-8000

EDWARDS, SIMMONS & OLIVER
Wesley MacNeil Oliver
1501 Sixteenth Avenue South
Nashville, TN 37212-2905
(615) 292-9280

HOLLAND & KNIGHT
Tom Bishop
50 N. Laura Street
Jacksonville, FL 32202
(904) 798-7305

*Counsel of Record for
Amicus Curiae
National Association of
Criminal Defense Lawyers

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